**MUDIE, J.**—The judgment debtor was summoned under section 326 of the Civil Procedure Code, 1918. He was ordered to pay the whole debt within three months. Section 327, which provides for the examination of the debtor on oath, was not complied with. Such an examination is a condition precedent to the making of an order under section 328. The order for payment within three months is, therefore, bad, and must be set aside.

There will be an order setting aside the Magistrate's order and for a re-hearing of the judgment debtor summons.

*Order Accordingly.*

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[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
March 29, 1935.

## IN THE MATTER OF THE ESTATE AND EFFECTS OF WAN AHMAD NASIR BIN NGAH IBRAHIM, DECEASED.

CHE NUTEH RAYFEYAH BINTI ABDUL KARIM Plaintiff.

vs.

1. GHOWS KHAN BIN IBRAHIM KHAN AS THE LEGAL REPRESENTATIVE OF IBRAHIM KHAN BIN GAFFOR KHAN, DECEASED.
2. WAN MOHAMED NOOR BIN WAN AHMAD NASIR AS THE LEGAL REPRESENTATIVE OF WAN AHMAD NASIR BIN NGAH IBRAHIM DECEASED ..... Defendants.

[PERAK MISCELLANEOUS CIVIL APPLICATION No. 109 of 1926]

*Executors—administration decree—common accounts—arbitration on the accounts—award against deceased executor—Registrar's Certificate based on award—plea of limitation on further consideration—interest on moneys in executor's hands—"costs of suit," meaning of.*

One of two proving executors of a will died and the estate of the testator was then left in the charge of the surviving executor I.K. These proceedings were brought by the testator's widow against I.K. for payment of a legacy alleged to be due to her under the will and for general administration of the Estate. During the pendency of the proceedings the surviving executor also died and by his will he appointed the first defendant executor. After I.K.'s death the second defendant obtained Letters of Administration *de bonis non* with will annexed of the estate and the conduct of the proceedings was thenceforward entrusted to him. Under an administration decree passed before I.K.'s death accounts were filed, the matter by agreement between the parties was referred to arbitration and according to the arbitrator's finding the accounts as filed showed that the deceased executor had overcharged the testator's estate to the extent of $31,124.37 which amount was by a subsequent agreement fixed at $30,750/-. The Registrar in due course proceeded with the Inquiry into the accounts and certified that there was a sum of $30,750/- due from the Estate of the deceased executor. This, in effect, was an adoption of the award. No appeal was entered against the Certificate. The second defendant moved the Court for, amongst other things, an order giving effect to the arbitrator's award, in particular, to the disallowance of the sum of $30,750/- from the disbursements shown in the accounts filed, for an order for interest to be charged on moneys which the deceased executor ought to have received in the course of administration and for costs of the inquiries into the accounts and of the Motion to be borne by the first defendant. In answer to the Motion, the first defendant pleaded *inter alia* that the adoption of the award should be claimed in a separate action, that the claim was barred by limitation and that interest ought not to be claimed unless it could be shown that the moneys were actually in the hands of the executor.

*Held*, that the arbitration and award having been adopted by consent of the parties as a means of ascertaining the extent of the falsifications and the award having been used, by subsequent agreement, as the basis of the Registrar's Certificate, against which no appeal had been lodged, the Court was competent to order the payment into Court of the balance certified to be due from the estate of the deceased executor.

*Held further*, that the plea of limitation failed, inasmuch as no evidence was adduced in support of the plea and to adjudicate upon it would involve the taking of further evidence.

*In re Williams*; *Jones* v. *Williams*, (1916) 2 Ch. 41 and *Shah Mohammad* v. *Piara Lal*, (1912) 13 I.C. 792 followed.

*Held also*, that interest was not chargeable, as there was no evidence of wilful default and it could not be shown that the amount overcharged by the deceased executor was actually received by him.

*Held further*, that "costs of the suit" includes the costs of all accounts and inquiries requisite for carrying out the decree and that they are not confined to costs up to the hearing.

*Krehl* v. *Park*, (1875) W.R. 475 followed.

*Goho* (*B.K. Das* with him) for the first Defendant.

*Woods* (*Rix* with him) for the second Defendant.

*Cur. Adv. Vult.*

**HOWES, J.**—This is a motion praying:—

(a) That the certificate of the Registrar dated the 23rd January, 1935 upon the taking of the accounts herein be varied so far as regards paragraph 4 thereof by the insertion of the words "in his personal capacity" after the word "not" in the first line of such paragraph, and again after the word "defendant" in the third line of such paragraph.

(b) That effect be given to the arbitration award accepted by the parties herein to the disallowance thereby of $30,750.00 from the disbursements shown in the accounts of the first defendant, by the disallowance month by month throughout such accounts of such sums totalling $30,750.00 as shall under the terms of the said award appear just, and that in the absence of agreement between the parties upon the just method of making such disallowance month by month, the same be referred back to the Registrar for a further certificate.

(c) that interest be charged against the estate of Ibrahim Khan deceased at such rates and for such periods as the Court shall think fit.

(d) that the costs of the inquiries into the accounts of the first defendant

herein and the costs of this motion be paid to the second defendant by the first defendant. The facts of this case are so complicated that as a preliminary it is necessary to set them out shortly in chronological order.

On 9th September, 1912, the original testator *Wan Ahmad Nasir* died.

On 20th August, 1913, Probate of the Will of *Wan Ahmad Nasir* was granted to the two executors named therein viz., *Wan Mohamed Isa* and *Ibrahim Khan* (the first named executor died and the Court is not now concerned with him) in Probate Application No. 37/1913.

From 9th September, 1912 till 22nd January 1927, on which day he died, *Ibrahim Khan* was in charge of the testator's estate; and the statement of accounts, the subject of the present motion, kept by *Ibrahim Khan* extends from 30th September, 1912 to 22nd January, 1927.

On the 23rd October, 1926, the widow of the testator, Che Nuteh Rayfeyah filed Miscellaneous Civil Application No. 109 of 1926 for administration; Ibrahim Khan (as surviving Executor) having been made defendant to the application. In the application, the widow claimed payment of a legacy alleged to be due to her under the Will of Nasir; and general administration of the estate.

The application was heard on 15th November, 1926, by Farrer-Manby, J, and an Order (not material to the present case) was drawn up on the 30th December, 1926.

On the 22nd January, 1927, Ibrahim Khan died. By his Will, he appointed *Ghows Khan* (the present first defendant) his Executor; and on the 23rd May, 1927, probate of the Will of Ibrahim Khan was granted to Ghows Khan.

On the 5th September, 1927, Letters of Administration with Will annexed *de bonis non* of the Estate of Wan Ahmad Nasir were granted to *Wan Mohamed Noor* (the present second defendant).

On the 1st November, 1927, in Miscellaneous Civil Application 109/26 (the present application) on the application of the present plaintiff. *Ghows Khan* (as Executor of Ibrahim Khan), and *Wan Mohamed Noor* (as Administrator *de bonis non* of Nasir) were substituted as defendants to the application in place of Ibrahim Khan (deceased).

The plaintiff *Che Nuteh Rayfeyah*, not being interested in the present motion, the conduct of the proceedings has been entrusted to the second defendant *Wan Mohamed Noor*.

On the 28th December, 1927, *Wan Mohamed Noor* (as Administrator *de bonis non* of Nasir) filed Originating Summons No. 1 of 1928 asking for a declaration of the Mohamedan law affecting the bequests contained in the Will of Nasir.

On the 28th August, 1928, a written order of Prichard, J, (dated at Singapore 22nd August, 1928) in the above Originating Summons 1 of 1928, but termed "M.C.A. 1/1928," appears to have been delivered by Thorne, J, and was embodied in the order dated 8th October, 1928 (Document (15) in M.C.A. 1/28) by which the greater part of the Will of Nasir was held to be void, according to Mohamedan law.

On the same day, in Miscellaneous Civil Application 109 of 1926 Prichard, J, made an Order for general administration (in that application) "subject to the terms of the order made with reference to the Originating Summons of the 3rd January, 1928, in M.C.A. No. 1/28." (Document (19) in 109/26).

This formal order was drawn up on the 25th March, 1929 (and appears as document (22) in M.C.A. 109/26) and therein it was ordered that accounts be taken by the Assistant Registrar.

On the 12th August, 1929, accounts were filed by *Ghows Khan*, as Executor of *Ibrahim Khan* but a copy of these was not supplied to *Wan Mohamed Noor* until 28th November, 1929.

On the 21st March, 1930, the plaintiff Che Nuteh Rayfeyah's solicitor filed a summons in Miscellaneous Civil Application 109 of 1926 (Document (30)) asking that the time for filing surcharges and falsifications of the accounts be extended; and by the Registrar's order of 5th April, 1930, the time was extended till 14th April, 1930.

From 1930 to 1932 *Wan Mohamed Noor* (as Administrator *de bonis non* of *Nasir*) proceeded with the administration and negotiations for a settlement.

On the 26th September, 1932, by order of Geranty, J., liberty was given to the second defendant Wan Mohamed Noor to file falsifications and surcharges of the accounts filed by Ghows Khan; and on the 3rd, October, 1932, a statement of the falsification of the said accounts was filed by Wan Mohamed Noor.

Most of the disputed items in the accounts concerned the management and running of the rubber estates which had belonged to the deceased testator Nasir, which estates had been managed by Ibrahim Khan.

On the 17th March, 1933, by a written submission, *Ghows Khan* (as Executor to Ibrahim Khan) and *Wan Mohamed Noor* agreed to refer all matters in dispute respecting the accounts of the rubber estates to Mr. *Sydney Bacon Palmer* as arbitrator, to determine whether the estate of *Nasir* had any claim against the estate of *Ibrahim Khan* "and what monies if any should be paid by the said *Ghows Khan* to the said Wan Mohamed Noor as administrator of the said estate."

This submission to arbitration was made by the parties by mutual consent, and without leave of the Court.

On the 12th October, 1933, Mr. Palmer gave his award, after a thorough investigation of the accounts of the different estates. As the result, the arbitrator found that Wan Mohamed Noor (as administrator of the estate of Nasir) had a claim against Ghows Khan (as Executor of Ibrahim Khan) for $31,124.37.

This figure was arrived at by the arbitrator estimating, as far as possible, month by month,

what should have been the proper charges for the production, manufacture &c., of the actual amount of rubber shown in the accounts to have been produced from the estates.

In effect, the arbitrator found that the accounts showed overcharges, or over-expenditure, proportionate to the rubber actually produced and sold to the amount of $31,124.37.

On the 27th March, 1934, the then Assistant Registrar, Mr. Bradley, resumed the inquiry into the accounts, but before giving any decision or certificate. Mr. Bradley was taken ill and was invalided to Europe.

On the 17th November, 1934, after negotiations between the parties with a view to settlement, the Assistant Registrar Tungku Ismail, notified the parties that he would on the 10th December, 1934, and following days proceed with the inquiry into the accounts. Apparently he did so on the 10th December, 1934 but on the 12th December, the parties came to an agreement which was signed by their respective Counsel (Document (54) in file).

By this agreement it was agreed :—

" (1) Arbitration award to stand as only falsification against accounts, and $30,750.00 to be allowed against the estate of Ibrahim Khan accordingly as monies overcharged against the estate of Wan Ahmad Nasir deceased.

(2) All other falsifications including Executor's allowance, motor allowance, and interest to be withdrawn, and these items to stand in the accounts.

(3) Question of interest to be charged against the estate of Ibrahim Khan deceased to be argued before the Judge, with liberty to Wan Mohamed Noor to argue for interest from 1912 onwards, and to use figures of arbitration award as basis of argument.

(4) The fact that interest on alleged advances has been charged by Executor and that Mohamed Noor has withdrawn falsification of this, not to be of itself a bar to interest being claimed and allowed against the Estate of Ibrahim Khan deceased over the same period or any part of it.

(5) Costs of accounts generally to be argued before the Judge."

On the same day, Messrs. Cowdy and Jones, and Mr. Seenivasagam (as solicitors for the second defendant and plaintiff respectively) wrote to Messrs. Das & Co., solicitors for the first defendant, a letter relating to $11,000.00 due by Wan Mohamed Noor personally to the estate of Ibrahim Khan; and agreeing that the first defendant should be at liberty to argue that no interest was payable by him; and admitting that items found by the arbitrator to be over-charged, are shown in the original accounts as having been spent.

The above agreement and a copy of the letter of 12th December, 1934, were filed, and appear as documents (54) and (55) in the file.

On 23rd January, 1935, the Assistant Registrar issued a Notice (document 57) that he had that day signed his certificate. The Registrar therein certified that as the result of the accounts and inquiries, he found that Ibrahim Khan as Executor of Nasir, had received estate to the amount of $216,040.02 and had paid $185,290.02 leaving a balance due from the estate of $30,750.00 : that he disallowed, from the accounts filed by Ghows Khan, this sum, as monies over-charged (as agreed to by the parties as appear from the minutes signed by counsel, and the letter from Messrs. Cowdy and Jones to Messrs. Das & Co., of 12th December, 1934) the question of this sum to be dealt with on the further consideration of this action; and lastly that Ghows Khan had not (nor had any other person by his order or for his use) received any part of the estate of the said testator. (i.e. Nasir).

It is to give effect to this certificate that the present motion is instituted.

Prior to the issue of the notice of motion, the first defendant Ghows Khan on 30th January, 1935, filed an affidavit intimating that when proceedings were brought by the second defendant for payment of the $30,750.00 disallowed by the Registrar, he would plead that the claim of the second defendant for payment is barred by limitation.

The position of the case, as it comes before me is this :—

There is the common administration order made by Prichard, J., on the 25th March, 1929 (document (22) ) in which the taking of accounts by the Assistant Registrar was ordered. This included an account of what shall be due from the estate of Ibrahim Khan, which was to be answered by Ghows Khan as Executor out of his assets in the course of administration. If Ghows Khan did not admit assets of Ibrahim Khan, then it was ordered that an account be taken of the property of the estate of Ibrahim Khan which came into the hands of Ghows Khan "or any other person or persons by the order or for the use of the said defendant Ghows Khan."

This Order was made not on the footing of wilful default by Ibrahim Khan, but was a common account, which would ordinarily require him as Executor not only to bring in an account of his receipts, but to discharge himself as regards these receipts, and to show what he had done with the money received.

Next, I have the order of Gerahty, J., of the 26th September, 1932, giving the second defendant Wan Mohamed Noor liberty to file falsifications and surcharges of the accounts filed by Ghows Khan.

Then, I have the certificate of the Assistant Registrar, in which it is certified that Ibrahim Khan received estate to the amount of $216,040.02, and that he has paid and is entitled

to be allowed on account thereof, sums to the amount of $185,290.02, leaving a balance due from the estate of the said Ibrahim Khan of $30,750.00 on that account.

No appeal has been lodged against this decision of the Registrar within 5 days, as required by Section 7 (iii) of the Courts Enactment, 1918.

In the course of the negotiations between the parties, I have the submission to arbitration by which Ghows Khan and Wan Mohamed Noor agreed that the arbitrator should determine "whether the estate of Wan Ahmad Nasir has any claim against the estate of Ibrahim Khan deceased and what monies if any should be paid by the said Ghows Khan to the said Wan Mohamed Noor as administrator of the said estate."

I cannot ignore this submission or the award, notwithstanding the fact that it was not made by leave or order of the Court. The parties entered into the submission with their eyes open, and had Ghows Khan intended to raise the objections now raised by his counsel, he should never have agreed to be a party to the submission.

Moreover, by the minute of the 12th December, 1934, signed by counsel for Ghows Khan and the other parties, it was expressly agreed that the "Arbitration award to stand as only falsifications against accounts and $30,750.00 to be allowed against the estate of Ibrahim Khan accordingly as monies overcharged against the estate of Wan Ahmad Nasir deceased."

It was on the strength of this agreement that the second defendant Wan Mohamed Noor withdrew any claims for falsification of the other items of the accounts.

The effect of the award is that the Arbitrator found that Ibrahim Khan had, or ought to have, received monies for which he had not accounted.

By Ibrahim Khan's failure to account, the inference is that these monies have been appropriated by him and added to his own estate.

As was stated by Bowen L.J., in *Phillips* v. *Homfray* [(1883) Ch. D at p. 454]:—

> "The only cases in which, apart from question of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys.....
>
> "The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there."

It was on this basis and understanding, that Ghows Khan agreed to submit the accounts to the arbitration of Mr. Palmer, and to accept the latter's decision. By this method, the right to falsify the accounts was waived, and the arbitrator's award was accepted in lieu thereof.

The true position appears to me to be, that Ghows Khan having admitted or rather, that the arbitrator whose decision he agreed to accept had found that Ibrahim Khan had not accounted for a certain sum, (which is now certified by the Registrar following the subsequent agreement between the parties to be $30,750.00) is now seeking to evade payment on grounds of law which were never raised before, but which could have been in the course of these lengthy proceedings.

It is not until Ghows Khan filed his affidavit on the 30th January, 1935, that he suggested limitation as a defence. This, if it had any substance, could have been raised at the time when the administration order was made by Prichard, J, on 28th August, 1928. Or, Ghows Khan could then have pleaded *plene administravit*. He did not do so; on the contrary, throughout, he has acted on the assumption that, as Executor of Ibrahim Khan, he was liable for any deficiency due by the estate of Ibrahim Khan.

Mr. Goho, counsel for Ghows Khan, has quoted a host of authorities, many of which, on closer examination, have little bearing on the present case. His first submission was, that where money has been wrongly expended by a trustee, beneficiaries have only a right to have the money made good, by a separate action, so that the Trustees can have an opportunity of putting all his defences to the claim.

He referred to *Pit* v. *Cholmondeley* (28 English Reports 360) which dealt with the onus of proof lying on the party having liberty to surcharge and falsify. In the present case, however, the arbitrator's award has been agreed as a substitute for falsification. *Heighington* v. *Grant* (41 E.R. 761) also quoted by Mr. Goho dealt with the omission of an executor to invest balances, pursuant to a direction in the Will, which was held not to be such misconduct as to disentitle him to the general costs of a suit; and has no bearing on the present case. *Job* v. *Job* (1875) 6 Ch. D 562 decided that an executor is in the position of a gratuitous bailee who cannot be charged with the loss of his testator's assets without wilful default; and "that though he is liable in equity in case of wilful default, he cannot be charged with it unless an account is ordered against him on that footing: you cannot charge him with wilful default without making out a case" (*per* Jessel, M.R. at 564).

The case of *Job* v. *Job* (*supra*) and *Mayer* v. *Murray* [(1877) 8 Ch. D. 424] were discussed by Fry, J., in *In re Symons, Luke* v. *Tonkin* [(1882) 21 Ch. D. at p. 761] where he stated:—

> "I understand these two cases to decide this, that if wilful default is charged in the pleadings, and evidence of it is adduced, accounts and inquiries on that footing may be directed at any stage of the proceedings."

It is admitted that in the present case, the order for accounts was not based on the alleged wilful default of Ibrahim Khan, but on a common account. As against this, there is the submission to arbitration authorising the arbitrator to determine what moneys should be paid by Ghows Khan to Wan Mohamed Noor as administrator to the estate of Nasir.

Mr. Goho further relied on the case of *Nutter* v. *Holland* [(1894) 3 Ch. 408] as an authority that money will not be ordered to be paid into Court by executors, unless it is actually in their hands, and contended that the accounts purported to show that the money had actually been expended by Ibrahim Khan. Also, on the case of *Neville* v. *Matthewman* [(1894) 3 Ch. 345] in which it was sought, unsuccessfully to order, upon an interlocutory motion, a trustee to make good an alleged breach of trust, who previously admitted having in his hands £1,000.00 belonging to the estate.

In the present case, it is admitted that the estate of Ibrahim Khan deceased is still in the hands of Ghows Khan. Moreover, a submission to arbitration by an executor, is in general, considered as a reference, not only of the cause of action, but also of the question whether or not he has assets; and where the arbitrator has awarded the executor or administrator to pay a certain sum of money, it is equivalent to determining that assets exist. [*Re Wansborough, Wansborough* v. *Dyer* (1815) 2 Chit. 40]. The fact that, in the present case, the arbitration was not held under an order of the Court, does not, in my view, prevent the same principle applying. If Ghows Khan had no assets, he should never have signed the submission. Further, the parties subsequently, expressly agreed that the award of the arbitrator should "Stand as only falsification against accounts."

To my mind, the crux of the present case is the arbitration and award which were adopted by consent of the parties, as a means of ascertaining the extent of the falsifications, and the award has been used, by subsequent agreement, as the basis of the Registrar's certificate.

I agree with the proposition that an award on an arbitration held in a pending suit, without the consent of the Court, cannot be enforced as such either under the Civil Procedure Code or under the Arbitration Enactment, 1912, but the agreement of the 12th December, 1934, cannot be disregarded, and must be considered as evidence of the intentions of the parties.

In the present motion, although the second defendant is, in para (b), praying "that effect be given to the arbitration award accepted by the parties herein and to the disallowance thereby of $30,750.00 from the disbursements shown in the accounts of the first defendant," this prayer appears to me to be superfluous, as all that the second defendant need have done was to move the Court to give effect to the certificate of the Registrar in which this sum was found due from the estate of Ibrahim Khan, by ordering the payment into Court of the balance found to be due.

The certificate of the Registrar unless varied or discharged is when filed binding on all parties, and according to English Chancery practice, is deemed to be approved and adopted by the Judge.

As I have already pointed out until the present motion there has been no appeal, or application to vary or discharge the Registrar's Certicate, which therefore stands.

Although the present motion might have been in a different form, I cannot see that the first defendant has in any way been embarrassed, and I shall treat the motion as if it had been simply to give effect to the Registrar's certificate.

I will now consider the plea of limitation raised by Ghows Khan in his affidavit.

Mr. Goho submitted that this defence could be raised at any stage even in the course of an appeal to the Privy Council, *Maha Raja Dheerai* v. *Government of Bengal*, (1850) 4 Moore, Ind. App. 466; 18 E.R. 777, and that this is the first opportunity the first defendant has had of raising it.

With the latter proposition I do not agree. The defence of limitation could have been raised at the hearing of the Originating Summons by Prichard, J., by affidavit, just as easily as it is raised now.

This point was considered by Neville, J. in *In re Williams. Jones* v. *Williams*, (1916) 2 Ch. at p. 41, and although in that case the point arose under the Trustee Act, 1888, Sec. 8, the principle applicable must be the same, assuming the defence of limitation were open to the defendant Ghows Khan. In that case, the learned Judge stated:—

> "What I have to consider is a very serious question indeed, namely whether the statute can be relied on and set up by trustees after an order for accounts inconsistent with it has been made. Here the trustees never suggested they were not liable to account from the testator's death until the accounts were being taken. It seems to me that if I now allow this defence an immense amount of time and money will have been thrown away..... In the present case the accounts are complete, and the question of the statute not having been raised until the account had been some time before the Master, the defendants cannot, in my opinion, now set up the defence of the statute."

The present case is much stronger against Ghows Khan. As late as 17th March, 1933, he signed the submission to arbitration to determine what moneys should be paid by him to Wan Mohamed Noor as administrator of the estate of Nasir.

This, in my view, was tantamount to an admission by Ghows Khan that money was either owing, or might be found by the arbitrator to be owing, by the estate of Ibrahim Khan to Wan Mohamed Noor as administrator.

Mr. Woods has argued that under Section 10 of the Limitation Enactment 1896 limitation cannot be pleaded by Ghows Khan, as he is a trustee in whose hands is property, which it is sought to follow.

This point was considered in *Shapurji Nowroji Pochaji* v. *Bhikaiji*, (1886) I.L.R. 10 Bombay, 242, and it was held that since that was a suit not for the purpose of recovering trust property, but only a suit for an account against an executor or his representative, the corresponding Section 10 of the Indian Limitation Act did not apply and a suit of that nature is barred after six years. Since that case was decided, the Indian Act has been amended, and the application of that section has been extended to suits for accounts. The F.M.S. Enactment has not been so amended, but there is this difference between the Indian Act 1877 and the F.M.S. Enactment, namely in the former under Section 3 "'suit' does not include an appeal or an application" whereas under the F.M.S. Limitation Enactment, 1896, Section 3, "'Suit' includes any action *or other proceedings*," which presumably, would include an order for administration. In the recent case of *S. V. S. Chokalingam Chettiar* v. *C. Kasivisvanathan Chettiar and another* (Privy Council Appeal No. 33 of 1933 reported in the Malayan Law Journal March 1935, p. 45) it was held that an administrator of the estate of an intestate or an attorney of such an administrator is "a person in whom property has become vested in trust for a specific purpose" within Section 9 of the Straits Settlements Ordinance No. 56 (Limitation) which is identical with Section 10 of the F.M.S. Limitation Enactment, and that such administrator was not protected by limitation.

From this, it seems clear to me that Ibrahim Khan, as executor of Nasir, was a person in whom property was vested in trust for a specific purpose, and therefore Ghows Khan cannot plead the Limitation Enactment.

Apart from the above decision, I should in any case have refused to entertain the plea. In so doing, I follow the judgment of Neville, J.. in *In re Williams* (*supra*) and that in *Shah Muhammad* v. *Piara Mal* (1912) 13 I.C. 792 in which it was laid down at page 794:

> 'If, after the issues in the case have been fixed and the case has proceeded to some length, a defendant raises the question of limitation, and the Court sees that, in order to decide that question, fresh issues of fact have to be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea."

Ghows Khan's affidavit of the 30th January, 1935, was the first intimation that he intended to plead limitation; he does not set out any facts to support his plea. To adjudicate upon it, would involve taking evidence, either oral, or by further affidavits. In these circumstances, I decline to entertain the plea. This disposes of the question of limitation.

I will now deal with the question of whether interest should be charged against the estate of Ibrahim Khan deceased. In the minute of the 12th December, 1934, signed by Counsel for the parties, it was agreed that this question should be argued before me.

The general rule is that if an executor keeps money dead in his hands without any sufficient reason or necessity then it becomes negligence, and a breach of trust and the Court will charge the executor with interest. But in order to give rise to a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount.

Mr. Goho has contended that interest can only be claimed on balances actually in the hands of an executor or in cases where wilful default is alleged, and it has not been shown that at the time these proceedings were instituted, there was any trust money in the hands of or under the control of Ibrahim Khan.

Mr. Woods, in support of the claim for interest, has shown that Ibrahim Khan in his accounts has charged interest at 8 per cent. per annum on moneys advanced by him to the estate while he was running the rubber plantations.

The principle on which the Court allows interest was laid down by Lord Cranworth in the case of the *Attorney-General* v. *Alford* (4 De G.M, 843, 851; 43 E.R. 737). There is stated:

> "What the Court ought to do, I think, is to charge him (the executor) only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it."

In the present case, there is this difficulty. The accounting party, Ibrahim Khan, is dead. There is nothing to show that any interest was actually received by Ibrahim Khan, and he cannot be fairly presumed to have received any; therefore the first and third alternatives given by Lord Cranworth do not apply. Can I hold, on the material before me, that Ibrahim Khan ought to have received interest? As I understand it, the basis of the balance found due by the arbitrator in this case, is not the actual amount shown in the accounts submitted by Ghows Khan as having been received, but what, in the arbitrator's opinion, as an expert, Ibrahim Khan ought to have received, after deducting the necessary expenses connected with the production and manufacture, in relation to the amount of rubber actually produced. It is a hypothetical amount, based on the arbitrator's experience in other rubber estates; and the amounts of expenditure and receipts shown in the accounts have been adjusted by the arbitrator, to what they respectively should have been, if Ibrahim Khan had managed the estates of Nasir (his testator) properly.

The expression used in the agreed minute of the 12th December, 1934, was that the $30,750.00 was "to be allowed against the estate of Ibrahim Khan according! as moneys overcharged against the estate of Wan Ahmad Nasir deceased." In the letter of the same date Messrs. Cowdy and Jones and Mr. Seenivasagam admitted that the "items found by the arbitrator to be overcharged are shown in the original executor's account books as having been spent."

Presumably the contention of the defendant No. 2 is that the amount shown as having been spent were either not so spent, or if spent, were wrongly paid.

At this stage it is impossible to ascertain whether the amounts shown in the accounts as expended, were actually paid, or if so in what circumstances, as Ibrahim Khan is not alive to explain them, and Ghows Khan is not in a position to do so.

There may have been losses or thefts in the production or manufacture of the rubber by persons employed by Ibrahim Khan, in which case Ibrahim Khan could not be charged with the loss of his testator's assets without wilful default. *(Job* v. *Job supra).*

In the absence of evidence of wilful default on the part of Ibrahim Khan except by inference, (based on the award of the arbitrator) I fail to see how I can presume that Ibrahim Khan ever received interest, or that he ought to have received interest on the trust moneys whilst he was managing the rubber estates.

I therefore hold that interest is not chargeable against the estate of Ibrahim Khan.

With regard to para (b) of the Notice of Motion, the last portion thereof, praying that effect be given to the award

> "by the disallowance month by month throughout the accounts of such sums totalling $30,750.00 as shall under the terms of the said award appear just &c."

is by no means clear to me, unless it was for the purpose of ascertaining the amount of interest claimed.

If this be so, since I have disallowed the claim to interest, any adjustment of the accounts month by month, is unnecessary. So far as I am concerned, the Registrar has disallowed those portions of the accounts which amount to $30,750.00 and I see no reason for going outside the certificate.

Mr. Woods has furnished an elaborate and voluminous document called "Adjustment of first defendant's accounts," as to which no evidence has been given, but which on page 15 shows $30,744.57 as "Balance being not disallowances" compared with the figure of $31,124.37 found by the arbitrator. It was stated by Mr. Woods that it was agreed that the difference, $379.80 arose in connection with some quit rents which should not have been disallowed by the arbitrator.

In view of the subsequent agreement that the disallowance should be accepted at $30,750.00, unless this document was prepared for the purpose of calculating interest, I confess I do not see the necessity for its preparation.

With regard to para (a) of the Notice of Motion praying for the variation of para 4 of the Registrar's certificate, although strictly speaking the application is made out of time, in view of para 2 of Messrs. Cowdy and Jones' and Mr. Seenivasagam's letter of 12th December, 1934, to the first defendant's Solicitors, which suggests it was at the first defendant's request that it was agreed that the certificate of the Registrar should show nothing was to be due by Ghows Khan personally, but this arrangement was not clearly incorporated in the Registrar's certificate, I am willing to allow the amendment and accordingly order that para 4 of the Registrar's certificate be varied by inserting the words "in his personal capacity" after the word "not" in the first line of such paragraph, and again after the word "defendant" in the third line of such paragraph.

On this motion, I therefore order that the first defendant Ghows Khan as executor of Ibrahim Khan deceased do pay into Court to the credit of this suit the sum of $30,750.00 out of the assets of the estate of Ibrahim Khan deceased, within three months.

With regard to costs. Mr. Goho contends that these must be governed by the order of Prichard, J., of the 25th March, 1929 (document 22) in which it was ordered "that the costs (sic) of all parties to this suit be taxed as between solicitor and client and paid out of the assets of the said testator." In support of his contention he refers to the case of *Krehl* v. *Park* [(1875) W.R. 475] in which the established practice of the Court that the costs of suit when given to a party, include the costs of all accounts and inquiries requisite for carrying out the decree, and they are not confined to the costs of suit up to the hearing, was approved.

In that case the inquiry had been directed by the original order, which (it was said) must, for this purpose, be treated as a decree, whether it was so in form or not.

In the order of Prichard, J, of the 25th March, 1929, it was ordered "that further consideration be adjourned with liberty to all parties to apply" and it is on further consideration that the matter comes before me.

Then follows the order as to costs already quoted.

The question is, can I vary that order as to costs on the further consideration of the suit? Following the case of *Krehl* v. *Park* (*supra*), the costs ordered by Prichard, J, would include the costs of accounts and inquiries, and that order stands. Moreover, I do not consider the fact that further consideration of the suit was adjourned, gives me power to reopen the ques-

tion of costs; or make any order in conflict with that already given by the learned Judge.

The words used by Prichard, J., in his order (which is the equivalent to a decree) were "costs of all parties *to this suit.*"

This point was considered in *Quarrell* v. *Beckford* [(1816) 56 E.R. at p. 106] by Sir Thomas Plumer, V.C. who said:—

> "What are the costs of the suit? Costs up to the Decree? Certainly not. If so intended it would have been said costs up to the decree. If the decree had reserved the question of subsequent costs up to this time, that would have left the Court at liberty, on further directions, to consider what ought to be done with the subsequent costs; but I think as to that part of the case the decree is conclusive."

In these circumstances, I have no alternative but to give effect to the order of Prichard J., and order that the costs of all parties to the suit be taxed as between solicitor and client and be paid by Wan Mohamed Noor as administrator *de bonis non* of the estate of *Wan Ahmad Nasir* (deceased). *Order accordingly.*

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[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

April 23, 1935.

**NGAN KHONG.....Plaintiff**

v.

**RAMAH BINTI PAKEH JAMIN**

**RASID BIN LUHA.....Defendants**

[PERAK CIVIL SUIT No. 6 of 1935]

*The Land Code, 1926, section 134—Lien—Not created by original holder of promissory note—Right of transferee of promissory note to create a lien—Meaning of "lien."*

The failure of the original holder of a promissory note to present a caveat and create a lien in respect of extracts from the mukim register deposited with him as collateral security does not prevent the transferee of such promissory note from so doing.

"Lien," in the Land Code, 1926, is a right of an active nature over land, analogous to an equitable mortgage, and means something quite different from the meaning assigned to "lien" in English law.

*G. Terrell* for the Plaintiff.

*E. C. Watson* for the Defendants.

*Cur. adv. vult.*

**HOWES, J.**—In this summons, the first defendant applies for an order that a caveat lodged by the plaintiff, and registered at his instance on the 22nd July, 1932, should be withdrawn, under Section 170 of the Land Code, 1926.

As a preliminary, I consider the procedure adopted, in issuing the summons in the course of the suit, was wrong; and that properly, the defendant should have issued an Originating Summons, as this application is made independently of the suit. However, rather than waste the time and money of the parties, in insisting on a fresh summons being taken out, I will deal with the application.

The facts of the case are as follows:

The two defendants on the 7th January, 1932, gave a promissory note for $840/- in favour of one Yap Hong Khai and as collateral security, the first defendant deposited four extracts from the mukim register Nos. 2585, 3297, 2440 and 3666 Chenderiang.

On the face of the promissory note these numbers are quoted as "being deposited as collateral security."

Yap Hong Khai did not present a caveat in respect of the above extracts under Section 166 of the Land Code, and therefore no "lien" over the land was ever created in his favour; but the extracts remained in his custody.

On the 11th July, 1932, Yap Hong Khai, by endorsement, transferred the promissory note to the present plaintiff, Ngan Khong, "absolutely." No mention was made of the collateral security, but the four extracts were deposited by him with the plaintiff.

Notice of the transfer of the promissory note to Ngan Khong was given to the defendants, and subsequently, they have paid interest to the present plaintiff amounting to $209.91.

Ngan Khong, on the 22nd July, 1932, presented a caveat in respect of the four extracts, which was duly registered. The first defendant now applies for an order that this caveat shall be withdrawn.

The defendants do not deny the rights of the plaintiff to payment under the promissory note, but Mr. Watson, for them, argues that as the original holder of the promissory note had no lien over the land, the plaintiff acquired no title to the land and that the registering authority was misled and should not have registered the caveat.

Mr. Watson contends that under Section 134 (i) of the Land Code the only person who can create a lien over land by presenting a caveat, is "the person with whom the same (i.e., the extract) has been deposited;" and only after registration of such caveat is the lien created.

He seeks to limit the right to present a caveat, to the original depositee of the titles. He does not deny that the titles were handed to the plaintiff by the original holder of the promissory note at the time of transfer.

He refers to the case of *Palaniappa Chetty* v. *Dupire Brothers*, 1 F.M.S.L.R. 370 in which the definition of "lien" in *Halsbury's* Laws of England Volume 19, page 2 was quoted at page 377 in the judgment of Whitley, J.C.:

> "'Lien' in its primary sense is the right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied."
>
> Applying this definition to the present case, appellant had the right to retain grant No. 5138 until the loan in respect